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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FEDERAL TRADE COMMISSION

Case No. 3:23-CV-2880-JSC

Plaintiff,

**NOTICE OF MOTION AND MOTION
FOR EXPEDITED CASE MANAGEMENT
CONFERENCE**

V.

MICROSOFT CORP

Judge: Hon. Jacqueline S. Corley

1

Defendants.

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that Defendants Microsoft Corp. and Activision Blizzard, Inc.
4 will, and hereby do, move this Court to set an expedited case management conference in this matter.
5 The motion will be made based on this Notice of Motion and Motion, the Memorandum of Points
6 and Authorities herein, the Proposed Order, all other papers and pleadings on file in this action, and
7 any other written or oral argument or evidence that Defendants might present to the Court.

8 **REQUESTED RELIEF**

9 Defendants Microsoft and Activision request that the Court exercise its discretion to set an
10 expedited case management conference in this matter.

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INTRODUCTION

This case involves the Federal Trade Commission's challenge to Microsoft Corporation's proposed acquisition of Activision Blizzard, Inc. For the express purpose of being ready to conduct a fulsome hearing in federal court in the event the FTC sought a preliminary injunction (not two simultaneous proceedings in a federal and an administrative court), the parties agreed to expedite pretrial matters in an FTC administrative proceeding that has been pending since December. The parties have completed fact discovery and exchanged witness lists, exhibit lists, and expert reports. Only one step remains before the case is ready for trial: expert depositions, which are currently set to take place between June 21 and 30.

The case has been moving at this fast pace because time is of the essence. The merger agreement by which Microsoft seeks to acquire Activision has a termination date of July 18, 2023. The agreement also contains a \$3 billion termination fee. The FTC filed an administrative complaint in December 2022. But they chose to file this suit—seeking a court order of indeterminate length to prevent the transaction from closing—6 months after filing its administrative complaint and only 6 weeks before the termination date. The FTC knows that a preliminary injunction decision will determine whether the transaction succeeds or fails, yet counsel claims that the preliminary injunction is required only to ensure there is time to complete the administrative process. Let there be no doubt, a preliminary injunction ruling is the only decision that matters under these challenging deadlines.

As history shows, the Court’s ruling on the FTC’s request for a preliminary injunction will decide the fate of this transaction, particularly in light of the termination date of July 18, 2023. If Defendants prevail, the FTC’s longstanding and unbroken practice has been to walk away from its challenge. On the other hand, if the Court grants a preliminary injunction, it will effectively block the transaction because the FTC’s process is “glacial” and one “[n]o substantial business transaction could ever survive.” *FTC v. Occidental Petroleum Corp.*, 1986 WL 952, at *13 (D.D.C. Apr. 29, 1986) (denying motion for preliminary injunction). This case illustrates the point. The FTC hearing is set to start after the termination date. There will be no decision until late December 2023

1 or early January 2024 at the earliest. That decision will not be final because the FTC recently
 2 concluded that such decisions are recommendations subject to the review of the Commissioners
 3 who authorized the complaint—a lengthy process that always results in a decision in the FTC’s
 4 favor. Defendants’ only recourse at that point is an appeal to a circuit court. Overall, this process
 5 takes several years—a timeframe no merger could survive. That is why FTC preliminary injunction
 6 hearings typically last at least five days—those hearings are the only hearings that will take place.

7 Defendants recognize the Court has issued an order temporarily restraining the transaction
 8 and setting a hearing for June 22-23. But Defendants respectfully submit that an appropriate initial
 9 step would be to hold an expedited case management conference at the Court’s earliest
 10 convenience—as soon as June 15, if possible given the Court’s busy calendar—to establish an
 11 appropriate schedule to resolve the FTC’s challenge.

12 To be clear, Defendants have no interest in delaying the resolution of this matter. But
 13 Defendants respectfully submit that a hearing of two days is not enough time to present the issues
 14 in this case and that further discussion of the schedule is warranted. The stakes of this case are
 15 high, and it involves important legal, factual, and economic issues. At minimum, Defendants
 16 believe the Court should allow the hearing to extend into the week of June 26, to permit expert
 17 discovery to conclude before the conclusion of the hearing, particularly given that the FTC’s motion
 18 for a temporary restraining order relies heavily on the reports submitted by their expert, Dr. Robin
 19 Lee.

20 As demonstrated in the schedule below, Defendants believe that the hearing could be
 21 scheduled for a minimum of five days beginning on June 22 and running through the week of June
 22 26 (or the soonest dates thereafter, based on the Court’s busy schedule). To ensure the case
 23 proceeds on a viable schedule, Defendants request that the Court set a case management conference
 24 as soon as possible to further discuss the format and length of the hearing.

25 **BACKGROUND AND PROCEDURAL HISTORY**

26 Defendant Microsoft Corporation is a technology company that competes in the gaming
 27 industry through its Xbox division. Defendant Activision Blizzard, Inc. is a video game developer

1 and publisher. On January 18, 2022, Microsoft signed a Merger Agreement to acquire 100% of
 2 Activision for \$68.7 billion. The Agreement requires the parties to close by July 18, 2023.

3 Shortly after the deal was announced, the FTC opened an investigation into the proposed
 4 acquisition. During the FTC’s nearly yearlong investigation, Defendants produced millions of
 5 documents and sat for several investigational hearings. On December 8, 2022, the FTC filed an
 6 administrative complaint before the FTC’s Office of Administrative Law Judges, seeking to bar the
 7 transaction under Section 7 of the Clayton Act and Section 5 of the FTC Act. *See* 16 CFR Part 3.
 8 Unlike in most other merger challenges where the FTC simultaneously files a case in federal
 9 court—because only a federal court has the power to preliminarily enjoin the transaction, *see* 15
 10 U.S.C. § 53(b)—the FTC delayed filing a federal action until Monday. Instead, the FTC initially
 11 scheduled an administrative hearing before the FTC’s Chief ALJ on an eight-month calendar rather
 12 than a five-month calendar (the “Part 3 proceeding”). *See* 16 CFR § 3.11(b)(4). That had the effect
 13 of setting the hearing for August 2, 2023—when there was no preliminary-injunction proceeding
 14 and when it was clear that the transaction’s termination date (July 18, 2023) was weeks before the
 15 hearing would even begin.

16 The FTC’s administrative process is lengthy. In this case, the proceedings before the ALJ
 17 would last until at least December 2023 (at the absolute earliest). Due to a recent rule change by
 18 the FTC, that proceeding would culminate in a “recommended decision” to the Commissioners that
 19 has no legal force of its own. FTC, *Federal Register Notice: Amendments to Part 3 Rules* (June 2,
 20 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p072104-amendments-to-part-3-rules-frn.pdf. The ALJ’s recommended decision would then be subject to automatic review by the
 21 Commissioners. That review takes a long time: As of several decades ago, “the average time from
 22 the initial decision to the final Commission decision exceeded 13 ½ months,” *Occidental*, 1986 WL
 23 952, at *13, and things have not improved materially since then. And as a former FTC
 24 Commissioner has recognized, the Commissioners’ review always results in a ruling in favor of the
 25 FTC. *See* Joshua D. Wright, *Section 5 Revisited*, at 6 (Feb. 26, 2015),
 26 <https://tinyurl.com/y2v2m449> (describing FTC’s undefeated record adjudicating complaints it
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1 voted out, regardless of the ALJ’s decision). After that, Defendants would have a right to appeal
 2 to a federal circuit court and the U.S. Supreme Court, which would take still longer.

3 Overall, this process would take several years, which no merger could survive. *See, e.g.,*
 4 *FTC v. Foster*, 2007 WL 1793441, at *51 (D.N.M. May 29, 2007) (denying motion for preliminary
 5 injunction and dissolving temporary restraining order, and noting that “the grant of a temporary
 6 injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.” (citation
 7 omitted)). For that reason, federal court proceedings under Section 13(b) are outcome
 8 determinative. When the FTC wins, the transaction collapses. *See, e.g., FTC v. Sysco Corp.*, 113
 9 F. Supp. 3d 1 (D.D.C. 2015) (granting FTC request for preliminary injunction of proposed merger);
 10 *In re Sysco Corp.*, FTC Docket No. 9364 (describing the defendants’ decision to abandon the deal
 11 after losing at the preliminary-injunction hearing). When the FTC loses, it abandons its
 12 administrative challenge. *See, e.g., FTC v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023
 13 WL 2346238 (N.D. Cal. Feb. 3, 2023) (denying FTC request for preliminary injunction of proposed
 14 merger); *In re Meta Platforms, Inc.*; FTC Docket No. 9411 (noting that FTC dismissed its
 15 administrative complaint).

16 To be prepared for the possibility that the FTC might eventually file a motion for
 17 preliminary injunction in federal court in this matter, the parties have been cooperating to expedite
 18 pretrial matters so that a federal judge can decide the matter in a timely fashion. Fact discovery is
 19 complete. And expert discovery will close on June 23 (with one deposition taking place on June
 20 30, by agreement of the parties). The FTC has disclosed one expert who has submitted over 350
 21 pages of reports (currently set to be deposed on June 21), and whom they principally rely upon in
 22 seeking emergency relief from this Court. Defendants have disclosed three experts (currently set
 23 to be deposed between June 21 and 30).

24 ARGUMENT

25 The hearing on the FTC’s motion for a preliminary injunction is not a trivial event. It is
 26 “well recognized that the issuance of a preliminary injunction prior to a full trial on the merits is an
 27 extraordinary and drastic remedy,” and that this is “particularly true in the acquisition and merger

1 context, because, as a result of the short life-span of most tender offers, the issuance of a preliminary
 2 injunction blocking an acquisition or merger may prevent the transaction from ever being
 3 consummated.” *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343–44 (D.C. Cir. 1980) (citations and
 4 internal quotation marks omitted). Defendants are aware of no situation where (1) a merger has
 5 closed after an unfavorable federal court decision on a preliminary injunction or (2) the FTC has
 6 pursued its administrative proceeding after losing in federal court.

7 While Defendants appreciate the Court’s willingness to move quickly, Defendants
 8 respectfully submit that an expedited case management conference would assist in setting an
 9 appropriate schedule for efficiently and effectively resolving a case of this magnitude. Defendants
 10 see two issues with the Court’s suggested path forward, both of which would benefit from further
 11 discussion.

12 *First*, the hearing date is currently set during expert discovery. While Defendants are
 13 prepared to accelerate the pace of expert discovery, Defendants submit that the parties and Court
 14 would benefit from having the experts deposed prior to the close of trial. That is particularly so
 15 because the FTC’s motion for a temporary restraining order relies heavily on the testimony of its
 16 expert and the reports he submitted—making it all the more important that the Court have a full
 17 and complete expert record when adjudicating the FTC’s motion.

18 *Second*, while Defendants believe the evidence can be presented expeditiously, Defendants
 19 are not aware of situations where a matter of this scope and importance was decided on just two
 20 days of testimony. On the contrary, federal court preliminary injunction hearings typically last at
 21 least five days, presumably because the hearing is the only one that will ever take place. *See, e.g.*,
 22 *Meta Platforms Inc.*, 2023 U.S. Dist. LEXIS 29832 (7-day hearing); *FTC v. Hackensack Meridian*
 23 *Health, Inc.*, Civil Action No. 20-18140, 2021 U.S. Dist. LEXIS 158158 (D.N.J. Aug. 4, 2021) (7-
 24 day hearing); *FTC v. Thomas Jefferson Univ.*, 2020-2 Trade Cas. (CCH) 81,469 (E.D. Pa. Dec. 8,
 25 2020) (6-day hearing); *FTC v. RAG-Stiftung*, Civil Action No. 19-2337, 2020 U.S. Dist. LEXIS
 26 18346 (D.D.C. Jan. 24, 2020) (two-week evidentiary hearing).

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Given the significance of this Court's decision on the FTC's preliminary injunction motion, Defendants propose the following schedule:

Event	Deadline/Date
Joint Case Management Statement	June 14, 2023
Initial Case Management Conference	June 15, 2023
Opposition to Preliminary Injunction	June 16, 2023
Reply in Support of Preliminary Injunction	June 20, 2023 (noon)
Pre-Hearing Conference	June 21, 2023
Close of Expert Discovery	June 23, 2023 ¹
Hearing	June 22, 2023 (running for a minimum of five days as soon thereafter as convenient for the Court)
Proposed Findings of Fact and Conclusions of Law	Submitted two days after the close of evidence

Defendants would also be available to take trial days when the Court has availability rather than setting the case in one full block.

In conclusion, because the preliminary injunction hearing will decide the fate of the transaction, Defendants submit that a longer hearing is warranted and that the parties and Court would benefit from an opportunity to discuss and set an appropriate schedule for resolving this important matter.

CIVIL LOCAL RULE 16 STATEMENT

Counsel for Microsoft have conferred with all other counsel. Defendant Activision supports this request for an expedited Initial Case Management Conference. Plaintiff Federal Trade Commission has declined to join a request for an expedited Initial Case Management Conference. Subject to the Court's order, the parties will meet and confer pursuant to Civil Local Rule 16-3 and submit a Joint Case Management Statement setting out their respective scheduling proposals no later than June 14, 2023, pursuant to Civil Local Rule 16-9 and the Standing Order for All Judges

¹ As noted above, the parties have agreed to one expert deposition currently slated for June 30, 2023.

1 of the Northern District of California.

2 **CONCLUSION**

3 Based on the circumstances described above, Microsoft and Activision jointly and
4 respectfully request that the Court issue the accompanying proposed Order setting an initial case
5 management conference on June 15 or 16, 2023, and requiring the submission of a joint case
6 management statement on June 14, 2023.

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8 DATED: June 14, 2023

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FEDERAL TRADE COMMISSION

Case No. 3:23-CV-2880-JSC

Plaintiff,

**[PROPOSED] ORDER GRANTING
MOTION FOR EXPEDITED INITIAL
CASE MANAGEMENT CONFERENCE**

V.

MICROSOFT CORP

Judge: Hon. Jacqueline S. Corley

200

ACTION URGED BY BLIZZARD INC.

No Hearing Date Set

Defendants.

[PROPOSED] ORDER

Having considered the Defendants' Motion for Expedited Initial Case Management Conference, the Court hereby GRANTS the Motion and ORDERS that an Initial Case Management Conference shall be scheduled for Thursday, June 15 or Friday, June 16.

The Court FURTHER ORDERS the parties to submit a Joint Case Management Statement on or before Wednesday, June 14, 2023.

Date:

Hon. Jacqueline S. Corley
UNITED STATES DISTRICT COURT JUDGE